

ALBERTA
OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER

ORDER F2002-028

December 19, 2002

ALBERTA CHILDREN'S SERVICES

Review Number 2373

Office URL: <http://www.oipc.ab.ca>

Summary: The Applicant requested a draft report from Alberta Children's Services (the "Public Body"). The Applicant also requested an initial fee waiver based on public interest. The Public Body denied the Applicant's information request under section 24(1)(a) [previously section 23(1)(a)] of the *Freedom of Information and Protection of Privacy Act*, (the "Act"). The Public Body argued that section 10(2) of the *Freedom of Information and Protection of Privacy Regulation* prevented it from waiving the initial fee.

The Adjudicator found the Public Body has discretion to waive the initial fee. The Adjudicator also found that the Applicant did not provide sufficient evidence to support a fee waiver and confirmed the charging of the initial fee by the Public Body. The Adjudicator confirmed the Public Body's decision not to disclose the record under section 24(1)(a) [previously section 23(1)(a)] of the Act.

Statutes Cited: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 24(1)(a) [previously section 23(1)(a)], 72 [previously section 68], 72(3)(c) [previously section 68(3)(c)], 93(1) [previously section 87(1)], and 93(4) [previously 87(4)]; *Freedom of Information and Protection of Privacy Regulation*, Alta. Reg. 200/95, ss. 9, 10(1) and 10(2)(a).

Orders Cited: AB: Orders 97-001 and 97-019.

I. BACKGROUND

[para 1] On December 13, 2001, the Applicant submitted an access request and a request for a waiver of the initial \$25 fee to Alberta Children's Services (the "Public Body") under the *Freedom of Information and Protection of Privacy Act* (the "Act"). The Applicant requested a copy of the KPMG Day Care Review Committee Report for the Minister of Children's Services. At the time of the access request, the report existed only in draft.

[para 2] On January 9, 2002, the Public Body denied access to the draft report and refused to waive the initial fee.

[para 3] On February 8, 2002, the Applicant requested a review of the Public Body's decisions. The mediation process did not resolve the issues and the matters proceeded to a written inquiry.

[para 4] The revised *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, F-25 came into force on January 1, 2002. Most of the section numbers of the Act changed but not the substance of the sections. Consequently, in this Order, I have set out the new section numbers. The previous section numbers appear in square brackets after the new section numbers.

II. RECORD AT ISSUE

[para 5] The record at issue is the draft KPMG Day Care Review Committee Report for the Minister of Children's Services (the "draft report").

III. ISSUES

[para 6] The three outstanding issues are:

- A. Is the Public Body authorized to waive the initial fee?
- B. If the Public Body is authorized to waive the initial fee, should the Applicant be excused from all or part of the fee as provided by section 93(4) [previously section 87(4)] of the Act?
- C. Did the Public Body properly apply section 24(1)(a) [previously section 23(1)(a)] of the Act to the record?

IV. DISCUSSION OF THE ISSUES

Issue A: Is the Public Body authorized to waive the initial fee?

[para 7] The charging and waiver of fees is set out in section 93(1) [previously section 87(1)] of the Act, which reads:

93(1) The head of a public body may require an applicant to pay to the public body fees for services as provided for in the regulations.

[para 8] Fees are not mandatory and are at the discretion of a public body: see Orders 97-001 (para.95) and 97-019 (para.170).

[para 9] In Order 97-001, the Commissioner stated the following at paragraph 95.

Although the use of fees to narrow a request is justified under a user pay system, the regulations do not require payment of a fee. Section 87(1) [now section 93(1)] of the Act gives the Public Body a discretion (“may”) to charge a fee for services. Fees are not mandatory.

[para 10] The Commissioner re-affirmed this interpretation in Order 97-019. I agree with the Commissioner’s interpretation.

[para 11] Section 93(1) [previously section 87(1)] of the Act references the *Freedom of Information and Protection of Privacy Regulation*, (the “Regulation”). The Regulation plays a subordinate and supportive role to the Act. Section 9 of the Regulation specifies that all fees are payable in accordance with sections 10, 11, 12 and 13 of the Regulation.

[para 12] Section 9 of the Regulation reads:

9 Where an applicant is required to pay a fee for services, the fee is payable in accordance with sections 10, 11, 12 and 13.

[para 13] Section 10 of the Regulation applies to this issue. Sections 10(1) and (2) address initial fees and read:

10(1) This section applies to a request for access to a record that is not a record of the personal information of the applicant.

(2) An applicant is required to pay

*(a) an initial fee of \$25 when a non-continuing request is made, or
(b) an initial fee of \$50 when a continuing request is made.*

[para 14] The Public Body relies heavily on the wording of section 10(2) of the Regulation. It is the Public Body's position that the interpretation of "is required to pay" prevents the Public Body from waiving the initial fee. I disagree with this narrow interpretation.

[para 15] Section 9 of the Regulation states that "Where an applicant is required to pay a fee", the fee is payable in accordance with section 10 of the Regulation. I take this to mean that section 10 would only apply if the applicant is required to pay a fee.

[para 16] As previously stated, section 93(1) [previously section 87(1)] gives the head of the Public Body the discretion to charge any fees. If fees are to be charged, they must be charged in accordance with the Regulation.

[para 17] Discretion regarding fees is also contemplated in section 93(4) [previously section 87(4)] of the Act which deals with the waiver of fees.

Section 93(4) [previously section 87(4)] reads:

93(4) The head of a public body may excuse the applicant from paying all or part of a fee if, in the opinion of the head,

(a) the applicant cannot afford the payment for any other reason it is not fair to excuse the payment, or

(b) the record relates to a matter of public interest, including the environment of public health and safety.

[para 18] In my view "all or part of a fee" includes the initial fee for general information. Therefore, I conclude that when section 93 [previously section 87] is read together with sections 9 and 10 of the Regulation, the head of a public body has the discretion to waive the initial fee for general information if the provisions of section 93(4) are present.

Issue B: If the Public Body is authorized to waive the initial fee, should the Applicant be excused from all or part of the fee as provided by section 93(4) [previously section 87(4)] of the Act?

[para 19] The Applicant argued that under section 93(4)(b) [previously section 87(4)(b)] of the Act, the draft report should be considered as a public report because it deals with a topic of public interest and therefore the initial fee should be waived.

[para 20] The Applicant did not provide sufficient evidence nor did I see sufficient evidence on the face of the record to support a finding of public interest, particularly when the evidence is that the Public Body intends to release the final report.

[para 21] Therefore, I confirm the initial fee charged by the Public Body.

Issue C: Did the Public Body properly apply section 24(1) [previously section 23(1)] of the Act to the record?

[para 22] The Public Body argued that the information found in the draft report was protected under section 24(1)(a) [previously section 23(1)(a)] of the Act, which reads:

24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal

(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,

[para 23] The Public Body submitted that the purpose of the draft report was to supply the Public Body with an analysis, recommendations and advice on the current relationship between the Public Body and the day care industry.

[para 24] The Public Body noted that the inclusion of “proposals, analyses and policy options” in section 24(1)(a) [previously 23(1)(a)] of the Act broadens the application of the section beyond advice and recommendations. The Public Body submitted that the analyses are not limited to “advice” type of information but include information about examinations into subject matters such as the day care industry.

[para 25] The Public Body contended that the draft report was to supply the Minister of the Public Body with an analysis of the current relationship between the Public Body and the childcare industry, as well as advice on the matter.

[para 26] The Public Body further argued that in exercising its discretion under section 24 [previously section 23], it did so in the interest of preserving frank deliberations conducted in private when discussing issues and arriving at decisions. The essence of the Public Body’s contention is that the draft report was not finalized at the time of the request. The Public Body considered that as the report was in “draft” and as the Minister had not yet considered the recommendations in the report, the final report might differ from the draft report. If the Public Body was to allow early or draft disclosure, such a disclosure could lead to a reader arriving at erroneous conclusions.

[para 27] The essence of the Applicant’s argument is that she considers the application of section 24 [previously section 23] of the Act to be an outrageous loophole that allows the government a method to avoid revealing what they are actually producing or achieving.

[para 28] However, the Applicant’s argument overlooks the need for members of a Public Body to deliberate before making a policy position or report public.

[para 29] In previous Orders, the Commissioner has said that the “advice” (which includes advice, proposals, recommendations, analyses or policy options) must be:

- a. sought or expected, or be part of the responsibility of a person by virtue of that that person’s position,
- b. directed toward making an action or making a decision, and
- c. made to someone who can take or implement the action.

[para 30] Having performed a line by line review of the draft report, I am satisfied that the “advice” sought by the Public Body meets the foregoing criteria. The Minister of the Public Body sought the “advice”, and the Minister, for whom the report was being prepared, is someone who can take or implement an action. At the end of the deliberative process the recommendations of the draft report will have to be accepted or rejected by the Minister. In other words the Minister is also someone who can take or implement the recommendations or chose to reject them.

[para 31] I also find that the factual information in the draft report is sufficiently interwoven with other advice, proposals, recommendations, analyses and policy options that I could not reasonably consider them separate and distinct so as to warrant severing the record.

[para 32] I find the record fits within section 24(1)(a) [previously section 23(1)(a)]. I am further satisfied with the Public Body’s submissions that it properly exercised its discretion regarding the non-disclosure. I therefore uphold the decision of the Public Body to refuse disclosure of the record.

V. ORDER

[para 33] I make the following Order under section 72 [previously section 68] of the Act.

[para 34] The Public Body has discretion to waive the initial fee under section 93(4) [previously section 87(4)] of the Act.

[para 35] I confirm the initial fee charged by the Public Body.

[para 36] The Public Body properly applied section 24(1)(a) [previously section 23(1)(a)] of the Act to the record. I confirm the decision of the Public Body not to disclose the record.

Dave Bell

Adjudicator